
U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: November 14, 1989
CASE NO. 86-ERA-23

IN THE MATTER OF

JOSEPH MACKTAL,
COMPLAINANT,

v.

BROWN & ROOT, INC.,
RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

ORDER REJECTING IN PART AND APPROVING IN PART
SETTLEMENT BETWEEN THE PARTIES AND DISMISSING CASE

The Administrative Law Judge (ALJ) in this case arising under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1982), issued a [recommended] Order on January 6, 1987, dismissing the matter with prejudice on the basis of a joint motion of the parties. Because it appeared from the record that the parties had entered into a settlement which led to the joint notion for dismissal, the Secretary issued an order to Submit Settlement Agreement on May 11, 1987.

On June 5, 1987, Respondent moved the Secretary for Reconsideration of the Order to Submit Settlement Agreement. Complainant, at that time represented by Billie P. Garde of the Government Accountability Project, notified the Secretary that he would not submit a copy of the settlement agreement until the Secretary had ruled on Respondent's motion.

On August 25, 1988, Attorney Stephen M. Kohn filed a notice of appearance on behalf of Complainant which stated that the firm of Kohn and Associates was Complainant's sole legal representative, and that Complainant was no longer represented by Billie P. Garde, Anthony Roisman, or the Government Accountability Project.

On September 9, 1988, Complainant submitted a Request to the Secretary of Labor Not to Approve the Settlement and for Remand (Complainant's Request), and a Motion for Expedited Consideration or for Emergency Partial Order (Complainant's Motion). A copy of the settlement was attached as an exhibit to Complainant's Request. Complainant asserted that the Secretary should set aside the settlement on several grounds:

> - That one paragraph of the agreement improperly restricts complainant from providing information to or testifying before various government agencies and is therefore void as against public policy;
> - That under section 5851(b)(2)(A) of the ERA the Secretary cannot enter into a settlement without the consent of the complainant and that Complainant does not now consent to this settlement;
> - That Complainant entered into the settlement only as a result of fraud and duress by his counsel then representing him, and by Respondent's taking undue advantage of Complainant's economic duress allegedly wrongfully caused by Respondent.

Complainant requested that the case be remanded to the ALJ for a hearing to determine whether fraud and duress render the settlement void and further requested that if a new settlement could not be reached, discovery be reopened and the case proceed to trial.

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Respondent filed an Opposition to Complainant's Motion on October 28, 1988. In addition, pursuant to a Briefing Order issued by the Secretary, Complainant filed a brief on December 20, 1988, and Respondent filed a reply brief on January 17, 1989. At the invitation of the Secretary, Complainant's former counsel, Billie P. Garde and Anthony Z. Roisman, filed a statement.

On May 12, 1989, Respondent filed a Notice of Express Waiver and Response to Complainant's Notification of Supplemental Authority (Resp. Notice of Waiver) in which Respondent states that on May 3, 1989, Respondent delivered to Complainant an express waiver of the right to enforce paragraph 3 of the settlement "to the extent that [it] [sic] might even arguably be construed to limit or restrict in any way Mr. Macktal, or his legal representative, from communicating with any representative of the NRC about potential safety issues. '"

SECRETARY'S AUTHORITY

Respondent asserts that the Secretary has no authority to approve or disapprove settlement agreements entered into by the parties in ERA cases. However, as I held in *Polizzi v. Gibbs & Hill, Inc.*, Case No. 87-ERA-38, Order Rejecting in Part and Approving in Part Settlement Submitted by the Parties and Dismissing Case, issued July 18, 1989,

> The Department of Labor does not simply provide a forum for private parties to litigate their private employment discrimination suits. Protected whistleblowing under the ERA may expose not just private harms, but health and safety hazards to the public. The Secretary represents the public interest in keeping channels of information open by assuring that settlements adequately protect whistleblowers.

Slip op. at 2-3 (footnote omitted). The ERA requires the Secretary to issue an order resolving the case "unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation . . . . " 42 U.S.C. § 5851(b)(2)(A). A case cannot be dismissed on the basis of a settlement "unless the Secretary finds that the settlement is fair, adequate and reasonable.". *Fuchko and Yunker v. Georgia Power Co.*, Case Nos. 89-ERA-9, 10, Secretary's Order

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to Submit Settlement Agreement issued March 23, 1989, at 2.

EXISTENCE OF A VALID AGREEMENT

A settlement is a contract, and its construction and enforcement are governed by principles of contract law. *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975); *Schwartz v. Florida Bd. of Regents*, 807 F.2d 901, 905 (11th Cir. 1987); *Orr v. Brown & Root, Inc.* Case No. 85-ERA-6, Secretary's Decision and Order issued October 2, 1985, slip op. at 2. A settlement agreement, therefore, must meet the same requisites of formation and enforceability as any other contract. There must be a meeting of the minds on all essential terms, *Blum v. Morgan Guaranty Trust Co. of New York*, 709 F.2d 1463, 1467 (11th Cir. 1983), and in evaluating the validity of a settlement "the court would have to determine . . . that the employee's consent to the settlement was voluntary and knowing." *Alexander v. Gardner - Denver Co.*, 415 U.S. 36, 52, n.15 (1974). When properly reached, settlement agreements are as binding, final and conclusive of rights as a judgement, *Thomas v. State of Louisiana*, 534 F.2d 613, 615 (5th Cir. 1976), and a party is bound by such an agreement even though he later realizes the agreement is disadvantageous, *Trnka v. Elanco Products Co.*, 709 F.2d 1223, 1227 (8th Cir. 1983), or he changes his mind. *Lyles v. Commercial Lovelace Motor Freight, Inc.*, 684 F.2d 501, 504 (7th Cir. 1982).

On January 2, 1987, Complainant's attorneys, Billie P. Garde and Anthony Z. Roisman, and an attorney for Respondent signed the Settlement Agreement which is in

dispute in this case. Complainant signed a General Release on January 7, 1987, as provided in paragraph 2 of the Settlement Agreement. The General Release specifically refers to the Settlement Agreement and states that the release is made "in consideration for the promises made [in the Settlement Agreement]."[1] It is undisputed that Respondent has paid Complainant and his former attorneys the $35,000 ($15,000 to Complainant and $20,000 to his counsel) provided for in paragraph 5 of the Settlement Agreement, although it is not clear from the record exactly when that payment was made. In September, 1988, twenty one months after signing the Settlement Agreement, Complainant, through his new counsel, filed his request that the Secretary not approve the Settlement Agreement.

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On the face of the documents, the Settlement Agreement and General Release, Complainant entered into a valid, binding agreement[2] which he may not now repudiate because he has changed his mind or now finds the settlement disadvantageous. *See* discussion *supra* at 4-5. Complainant asserts, however, that he never voluntarily entered into the Settlement Agreement but did so only due to fraud and duress. Based on Complainant's Affidavit of September 9, 1988, attached to Complainant's Request, and on Complainant's Brief, the asserted fraud and duress was of two types. First, Complainant's attorneys at the time allegedly threatened and pressured him into signing the General Release although, he asserts, he wanted to go to hearing on his complaint. Second, Complainant asserts that Respondent took undue advantage of his economic condition which was caused by Respondent's alleged wrongful termination of Complainant and Respondent's successful opposition to Complainant's receipt of unemployment benefits.

Complainant cannot repudiate this settlement because of alleged fraud or duress by his own attorneys. *Petty v. Timken Corp.*, 849 F. 2d 130 (4th Cir. 1988); *Gilbert v. United States*, 479 F.2d 1267 (2d Cir. 1973). Only improper conduct by the opposing party makes a settlement voidable. *Jurgensen v. Fairfax County, Va.*, 745 F.2d 868, 889 (4th Cir. 1984).

In *Petty v. Timken Corp.*, the plaintiff's attorney settled the case after consultation with plaintiff who later claimed that he had authorized his attorney to settle because of "improper inducement" by his attorney. 849 F.2d at 132. The district court refused to hold a hearing on plaintiff's claim of improper inducement and granted the defendant's motion to enforce the settlement. Upon review the court of appeals first rejected plaintiff's argument that the district court should have held an evidentiary hearing on the validity of the settlement. The court held that trial courts possess inherent power to enforce a settlement without a hearing, except where there is a material dispute about the existence of an agreement or about the authority of an attorney to settle for his client. *Id*. at 132. The court held that a settlement did exist. Furthermore, even assuming that allegations of misconduct by plaintiff's attorney were true,

[w]hen a litigant voluntarily accepts an offer of

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> settlement, either directly or indirectly through the duly authorized actions of his attorney, the integrity of the, settlement cannot be attacked on the basis of inadequate representation by the litigant's attorney . . . . [A]ny remaining dispute is purely between the party and his attorney . . . . Unless the resulting settlement is substantially unfair, judicial my demands that a party be held to the terms of a voluntary agreement.
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> A litigant who enters the judicial process through the agency of freely chosen counsel always assumes a certain risk that the result achieved will not be satisfactory. Defeated expectations do not, therefore, entitle the litigant to repudiate commitments made to opposing parties or to the court.

849 F.2d at 133.

Complainant does not contest that he twice signed the General Release, which included explicit references to the Settlement Agreement and that he accepted the benefits of the agreement, including $15,000 in cash. Thereafter he raised no objections to the settlement for 21 months. Accordingly, I find that Complainant has not presented any material factual dispute as to the existence of the settlement or the authority of his attorneys to reach agreement on his behalf. Therefore, I see no need to remand this matter for an evidentiary hearing on the validity of his consent to the settlement. Complainant must be relegated to relief against his former attorneys for any damages which Complainant believes their action may have caused him. *Interspace, Inc. v. Morris*, 650 F.Supp. 107, 110 (S.D.N.Y. 1986).[3]

Nor can I void the settlement based on Complainant's allegation that Respondent took undue advantage of his economic distress which Complainant claims was caused by Respondent's wrongful conduct. In a similar situation where a Postal Service employee had been discharged and then settled his action challenging the discharge, the Federal Circuit rejected the employee's claim that the settlement should be overturned because he entered into it under economic duress. *Asberry v. United States Postal Service*, 692 F.2d 1378 (Fed. Cir. 1982).

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> Every loss of employment entails financial hardship. If that alone were sufficient to establish economic duress, no settlement involving it would ever be free from attack. 'In order to successfully defend on the ground of force or duress, it must be shown that the party benefited thereby constrained or forced the action of the injured party, and even threatened financial disaster is not sufficient.' *DuPuy v. United States*, 67 Ct. Cl. 348, 381 (1929), *cert. denied*, 281 U.S. 739 (1930).

692 F.2d at 1381. Similarly in *Jurgensen v. Fairfax County, Va.*, 745 F.2d 868 (4th Cir. 1984), an employee's settlement of a personnel action against him, and his later challenge of the settlement on the grounds that he was being threatened with dismissal and financial hardship, was denied. The court held that threatened dismissal, with consequent financial hardships, did not constitute a "wrongful coercive act[]" or duress which would void the settlement. 745 F.2d at 889.

Complainant characterizes Respondent's alleged improper conduct here as the "wrongful termination" of Complainant, and Respondent's successful denial of unemployment benefits to Complainant. Complainant's Brief at 25. Unemployment benefits are granted or denied by a state agency, and there is nothing wrongful in Respondent's opposition to the granting of benefits in a state administrative proceeding to protect its experience rating in the unemployment insurance system. As the courts held in *Asberry v. USPS* and *Jurgensen v. Fairfax County*, threatened dismissal or even actual dismissal, which Respondent here vigorously contends was based on legitimate business reasons, does not constitute duress making a settlement voidable.

VALIDITY OF PARAGRAPH 3 OF THE SETTLEMENT

Complainant argues that some or all of paragraph 3 of the Settlement Agreement is void as against public policy, and that therefore the entire agreement is void because paragraph 3 is not severable. Paragraph 3 of the Settlement Agreement provides:

> Mr. Macktal's representatives in the above-captioned action, Mr. Anthony . Roisman and Ms. Billie P. Garde

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> (including Trial Lawyers for Public Justice and the Government Accountability Project, the organizations of which Mr. Roisman and Ms. Garde, respectively, are a part and through which they came to represent Mr. Macktal), hereby agree that they will not call Mr. Macktal as a witness or join Mr. Macktal as a party in any administrative or judicial proceeding in which either Mr. Roisman, Ms. Garde, Trial Lawyers for Public Justice or the Government Accountability Project, or any combination of them are now, or in the future may be, counsel or parties opposing any of the Comanche Peak companies, organizations, programs or individuals as defined above; nor will Mr. Roisman, Ms. Garde or their respective organizations do anything to suggest or otherwise to induce any other attorney, party, administrative agency, or administrative or judicial tribunal to call Mr. Macktal as a witness or to join Mr. Macktal as a party in such a proceeding. Further, Mr. Macktal hereby agrees that he will not voluntarily appear as a witness or a party in any such proceeding; and Mr. Macktal further agrees that if served with compulsory process seeking to compel his appearance or joinder in such a proceeding, he will immediately notify the undersigned representative of Brown & Root, or his successor, in writing and thereafter take all reasonable steps, including any such reasonable steps as may be suggested by the representatives of Brown & Root, to resist such compulsory process.

On May 12, 1989, Respondent filed a Notice of Express Waiver and Response to Complainant's Notification of Supplemental Authority in which Respondent expressly waived "any right to enforce the disputed provision of the agreement 'to the extent that [it] [sic] might even arguably be construed to limit or restrict in any way Mr. Macktal, or his legal representative, from communicating with any representative of the NRC about potential safety issues.'" Respondent's Notice at 2. Paragraph 3 of the Settlement Agreement appears to cover more than Complainant's contacts with the NRC, and could be read to restrict Complainant's contacts with other federal, state or local agencies or his cooperation with or appearance as a witness in such agencies' proceedings. Consideration of the effect of this provision of the agreement and its relationship to the rest of the agreement therefore is appropriate.

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I recently considered a similar provision in a settlement agreement in an ERA case also involving the Comanche Peak Steam Electric Station in *Polizzi v. Gibbs & Hill, Inc.*, Case No. 87- ERA-38, Secretary's Order Rejecting in Part and Approving in Part Settlement Submitted by the Parties and Dismissing Case issued July 18, 1989. Paragraph 3 of the Settlement Agreement here, although somewhat more limited in scope than the provision reviewed in *Polizzi v. Gibbs & Hill, Inc.*, would have a similar effect of drying up channels of information for the Department of Labor in ERA cases and under other laws, as well as for other agencies in carrying out their responsibilities. For the same reasons as set forth in *Polizzi v. Gibbs & Hill Inc.*, slip op. at 5-7, which I adopt and incorporate here,[4] I find paragraph 3 void as against public policy.

Complainant argues that as a matter of equity, the Secretary should not treat the void provision of the Settlement Agreement as severable from the remainder of the contract because Complainant claims that Respondent engaged in serious misconduct when it forced Complainant to agree to paragraph 3 by its dominant bargaining power. However, in similar circumstances, where the parties' relative bargaining power was comparable to that of Complainant and Respondent here, courts have held the parties to the remainder of their bargain after finding a severable provision of a settlement void as against public policy. *See EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1090-1091 (5th Cir. 1987); *McCall v. United States Postal Service*, 839 F.2d 664, 666 at * (Fed. Cir. 1988). As the Supreme Court said in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), a "promisor may not avoid performing a perfectly legal promise because he has also made a separate, illegal undertaking." 455 U.S. at 82, n.7. In addition, it hardly seems appropriate for Complainant to seek to overturn the entire settlement when he was silent for 21 months and still enjoys the benefits of it, i.e. $15,000 in cash. *Cf., Interspace, Inc. v. Morris*, 650 F. Supp. 107 (S.D.N.Y. 1986).

The provisions of paragraph 3 of the Settlement Agreement inured entirely to the benefit of Respondent. Moreover, Respondent has explicitly stated that, from its point of view, paragraph 3 was "collateral to the central agreement." Respondent's Opposition at

32. Accordingly Paragraph 3 is severed and I hold that the remainder of the agreement is valid and enforceable.

RIGHT TO WITHDRAW PRIOR TO APPROVAL BY THE SECRETARY

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Finally, Complainant appears to argue that, regardless of whether the settlement was valid when signed, or is void in whole or in part as against public policy, the Secretary cannot approve it because Complainant does not now consent to it. Complainant's Request at 6. Complainant did not cite any authority for this proposition.

The cases appear to reject the proposition that a party, after signing a settlement, can withdraw from it or oppose court approval of it at any time up until the time the court approves it. In *George v. Parry*, 77 F.R.D. 421 (S.D.N.Y.) 1978), *aff'd without op*. 578 F.2d 1367 (2d Cir. 1978), *cert. denied*, 439 U.S. 947 (1978), the court held that a settlement is an executory contract which is binding on the parties until the court renders a decision. 77 F.R.D. at 423. In *Allen v. Alabama State Board of Education*, 612 F. Supp. 1046 (M.D. Ala. 1985), *vacated on other grounds*, 636 F. Supp. 64 (M.D. Ala. 1986), *rev'd and enforced*, 816 F.2d 575 (11th Cir. 1987), a consent decree was signed by attorneys for the class representative and the defendants in a class action under Title VII. Defendants then challenged the settlement on several grounds, including the argument that the agreement was not binding because the court had not yet approved it for the plaintiff class. 612 F. Supp. at 1053. The court noted that there is an overriding public interest in settlements subject, in class actions, to a finding by the court that the settlement is fair, adequate and reasonable. 612 F. Supp. at 1054.

> To allow the named parties to repudiate a settlement at any time, as long as the court has not approved the settlement for the plaintiff class, would permit substantial waste and abuse of the court's and the parties' time and resources; it would be administratively inefficient and unfair both to the court and the parties . . . . [A] settlement agreement in a class action . . . is just as binding on the named parties as a settlement in any other lawsuit . . . .

Id. In *Georgevich v. Strauss*, 772 F.2d 1078 (3d Cir. 1985) (en banc), the district court had held that where the court must be a party to and approve of a settlement before it may be consummated, any party can withdraw from the settlement prior to the court's final approval. The court of appeals, however, held

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that rule too broad, indicating that a simple change of mind by a party would not suffice to withdraw from a settlement. In the particular circumstances of that case, however, where the district court had invited briefing on the merits, "[t]he shift in position by the class representative and his counsel apparently came about as a result of the issues raised

by the court. Under these circumstances, we reject [the opposing party's] claim of waiver [of the right to object to the settlement.]" 772 F.2d at 1085.

Settlements which adequately protect the rights of whistleblowers further the purposes of the Act and should be favored and encouraged. Employers would be less likely to enter into settlements if they thought a complainant could withdraw from it if he changed his mind or believed for whatever reason that he could obtain greater relief by going to a hearing. More fundamentally, a primary purpose of the approval of settlements by the Secretary is to assure that the parties' private bargain does not improperly infringe on the public interest. *See* discussion at pp. 3-4 *supra*. Absent any improper interference with that interest, the parties should be held to their bargain as they would in any other contract, so long as that bargain is fair, adequate and reasonable. *Cf. Trnka v. Elanco Products Co.*, 709 F.2d 1223, 1227 (8th Cir. 1983).

OTHER LAWS

Finally, I note that the General Release and paragraph 2 of the Settlement Agreement appear to encompass the settlement of matters arising under various laws, only one of which is the ERA. For the reasons set forth in *Poulos v. Ambassador Fuel Oil Co. Inc.*, Case No. 86-CAA-1 Secretary's Order issued November 2, 1987, slip op. at 2, I have limited my review of the agreement to determining whether its terms are a fair, adequate and reasonable settlement of Complainant's allegations that Respondent violated the ERA.

With the exception of paragraph 3, I find the terms of the agreement within the scope of my authority under the ERA to be fair, adequate and reasonable, and to that extent I approve it.

Accordingly, the complaint in this case is DISMISSED.

SO ORDERED.

ELIZABETH DOLE
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] Complainant actually signed the General Release twice, the first time on January 5, 1987, when handwritten changes were made on the General Release, and again on January 7, 1987, after it had been typed in final form. *See* attachments 7 and 9 to Respondent Brown & Root, Inc. is Opposition to Motion for Emergency Partial Order.

[2] *See* discussion at 10-14, *infra*, of provisions of the agreement which are void as against public policy, and the severability of those provisions.

[3] This ruling does not imply that complainant's former attorneys did or did not exert duress or undue influence on Complainant to reach settlement.

[4] In *Polizzi v. Gibbs & Hill, Inc.*, I held that

> Paragraph 7 of the Settlement Agreement significantly restricts access by the Department of Labor, as well as other agencies, to information Complainant may be able to provide relevant to the administration and enforcement of the ERA and many other laws. Its effect, to a large degree, would be to "dry up" channels of communication which are essential for government agencies to carry out their responsibilities. *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972). As such, I find it against public policy. [Footnote omitted.]
> In *EEOC v. Cosmair, Inc.*, 821 F.2d 1085 (5th Cir. 1987), the court held that waiver of the right to file a charge with EEOC was void as against public policy. The court distinguished between waiver of the right to file a charge and waiver of the right to recover personally on a cause of action. The court explained
> Allowing the filing of charges to be obstructed by enforcing a waiver of the right to file a charge could impede EEOC enforcement of the civil rights laws . . . . A charge not only informs the EEOC of discrimination against the employee who files the charge . . . but also may identify other unlawful company actions. When the EEOC acts on this information, "albeit at the behest of and for the benefit of specific individuals, it also acts to vindicate the public interest in preventing employment discrimination." . . . We hold that an employer and an employee cannot agree to deny to EEOC the information it needs to advance the public interest.
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> 821 F.2d at 1090 (citations omitted.) Following the Supreme Court's guidelines that [a] promise is unenforceable if the interest in its enforcement is outweighed by a public policy harmed by enforcement of the agreement," *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987), the court in *EEOC v. Cosmair, Inc.*, held that a waiver of a right to file a charge is void as against public policy. 821 F.2d at 1090. The restriction on access by government agencies to Complainant's information here is, if anything, greater than in *EEOC v. Cosmair, Inc.*, and I find that it is unenforceable as against public policy.